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The Foreign Lawyer Law of Japan: Legitimate Complaints or Red Herrings?

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Over the last several decades, the international demand for professional services has increased exponentially. According to the World Trade Organization, world exports of commercial services were over $1.4 trillion in 2000.[1] While the future appears to be bright for increased trade in international services, the General Agreement on Trade in Services (GATS) only applies when foreign companies have been allowed to provide a service in a host country. When host countries have limited market access, free trade is still an issue of contention.

In the case of Japan, it's closed markets to foreigners that provide intellectual services have evoked criticism both at home and abroad.[2] One example is the ongoing discussions about the liberalization of foreign legal services. Since the 1970s, foreign lawyers have sought greater access to the Japanese legal services market. Japan's foreign lawyer law, *Gaikoku Bengoshi ni Yoru Horitsu Jimu no Toriatsukai ni Kansuru Tokubetsu Sochi Ho* 66, 1986 (Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers, (Law No. 66 of 1986)) (hereinafter Law 66) in large part, limits the role of foreign attorneys to assisting Japanese businesses that wish to internationalize their operations. Implicitly, the law allows foreign legal professionals to fulfill an important role in helping Japanese companies navigate foreign legal systems and markets. Some Japanese legal experts, however, fear that foreign attorney's presence and style of practice pose a threat to Japan's legal system and culture.

Gaikokuho jimu bengoshi (licensed foreign lawyers in Japan) and foreign governments argue that foreign legal services provide valuable market entry assistance to foreign businesses. As a result, restrictions placed on foreign legal services are just another trade barrier imposed by the Japanese.[3] Recent regulations have broadened the range of services that foreign attorneys can provide in Japan. Arguably, the new guidelines are beneficial to all clients. On the

surface, the estimated 139 registered foreign lawyers in Japan suggests that deregulation may be improving market access for foreign attorneys.

There is a wide range of views on the role of foreign lawyers in Japan. At one extreme, some say staffing a foreign law office is a promotional tool rather than a serious attempt to provide international services.[4] Given the high cost of opening and operating an overseas office in Tokyo, however, the notion of maintaining a money-losing overseas office just to keep up impressions is not popular amongst foreign firms.[5] Others suggest that foreign lawyers are responding to the increasing globalization of business.[6] Law firms expand internationally in order to serve domestic clients abroad as well as incoming foreign clients. Furthermore, there is the notion that international law practitioners serve as facilitators of commerce. Foreign lawyers can also serve as advisors for international finance, tax planning, corporate and securities law, franchising, licensing, distribution and commercial agency, joint ventures, competition law, arbitration and general international law.[7]

While the transaction support role of foreign lawyers is addressed in the literature, little is known about the effectiveness of foreign legal services in serving clients and the public interest.[8] In light of the historical intent of Law 66, there is a need to examine this issue. Three main questions will be addressed in following analysis. First, do foreign and local customers equally understand how the recent changes in the foreign lawyer law affect them ? A gap in awareness suggests the intended beneficiaries of the changes may not be using them to the best advantage. Second, do customers have similar attitudes about uses of legal services in Japan ? A larger pool of legal service providers has questionable value to customers if they have limited use for them. Finally, does it make sense to further expand the role of foreign attorneys in Japan ? A more open market for legal services may lead to greater market access by all businesses or, it may have unintended negative consequences.

Japan's Modern Foreign Lawyer Law

Law 66 went into effect on April 1, 1987. Ostensibly, Law 66 was enacted to aid international business both inside and outside Japan. Other stakeholders that pressed Japanese lawmakers to liberalize the foreign lawyers' law include the American Bar Association, other U.S. bar associations, the U.S. Trade Representative and the European Business Community. In addition to outlining registration requirements for foreign lawyers, Law 66 regulates foreign lawyers' rights of association with Japanese lawyers, scope of practice, and form of business organization.

Law 66 did not resolve all the important issues from both the American's and the European Union's perspectives. In particular, the U.S. was on the offensive to broaden the scope of Law 66. On April 28, 1989, less than two years after the effective date of its enforcement, the U.S. Trade Representative submitted the "Report on Barriers to Japanese Trade" to the U.S. Congress.[9] Conclusions in the report state that the restrictions on foreign lawyers in Japan constitute a barrier to trade. The U.S. Trade Representative sought the following amendments on behalf of American (and other foreign) lawyers to allow foreign lawyers: (1) to enter into partnerships with *bengoshi* (Japanese attorneys); (2) to hire *bengoshi*; (3) to practice in Japan under their home country firm names (without using the name of the individual *gaikokuho jimu bengoshi*); (4) to count non-home country experience in the calculation of the five years of experience needed to be licensed in Japan; and (5) to represent clients in international arbitration proceedings held in Japan (concerning all areas of law, including cases governed by the laws of Japan).

Following lengthy bilateral (Japan-U.S.) and multilateral (European Union, Japan, and U.S.) negotiations, Law 66 was amended in June 1994 (in effect as of January 1, 1995 and hereinafter Special Measures Law 1994).[10] The negotiations culminated in an agreement reached in the context of the General Agreement on Tariffs and Trade (GATT) Uruguay Round of trade negotiations. The amendments under Special Measures Law 1994 provided the following changes: (1) eased reciprocity and professional experience requirements; (2) allowed firms to use their own names rather than the senior partner's; and (3) introduced the *Tokutei Kyodo Jigyo* (Specific Joint Enterprise), a restricted type of relationship between *gaikokuho jimu bengoshi* and *bengoshi*.[11] The law was further amended in June 1996 (in effect as of September 1, 1996 and hereinafter Special Measures Law 1996).[12] Special Measures Law 1996 allows foreign lawyers and *gaikokuho jimu bengoshi* to represent their clients in international arbitrations held in Japan. As a result, foreign lawyers may participate as arbitrators or representatives of parties to international proceedings held in Japan. This new role for foreign lawyers is not restricted by the governing law of the arbitration (even if the law of Japan governs), or whether the attorney is registered as a *gaikokuho jimu bengoshi*. In May 1998, the law was amended again (hereinafter Special Measures Law 1998).[13] The amendments under Special Measures Law 1998 further liberalized the professional experience requirement, and increased the scope of practice of the Specific Joint Enterprise.[14]

The Role of Foreign Lawyers in Japan

The liberalization of Japan's foreign lawyer regulations has been a long, drawn-out process.[15] Some legal scholars argue that the unique nature of Japanese legal culture and its legal system requires that legal advisors be trained in Japan. Lawyers not trained in Japan should be allowed only limited access. At the opposite extreme, other legal scholars do not see major differences between Japan's legal culture and that of other countries'. In addressing this issue, the comparative literature on Japan's legal environment has three main branches.

First, there is the Consciousness school, which assumes that the legal environment of Japan is radically different than that of the West. Consciousness theorists argue that the Japanese prefer to resolve disputes through mutual understanding and accommodation rather than litigation.[16] In the realm of contracts, Kawashima's seminal work holds that the legal consciousness of the Japanese does not conform to Western conceptions of contract.[17] Instead, the Japanese are said to prefer *wakai* (compromise) rather than conflict. The strong desire for *wakai* is a primary reason for the dearth of contract litigation in Japan. In a similar vein, Sawada's[18] analysis of contractual agreements finds that Japanese business people have a negative attitude towards the observance of the accepted rules of contract law.[19] One commentator has even declared, "We Japanese do not go so far as to consider a breach of contract to be a virtue but we are certainly not very serious about honoring contracts."[20]

Western commentators have made comparable observations. For example, Von Mehren suggests that Confucian thought and a desire to avoid conflict in human relations help explain the unique Japanese legal environment.[21] Western writers often compare the overly litigious U.S. to Japan and base the contrast on widely divergent views regarding resort to the legal system to resolve disputes. In one case, Galanter writes: "Japan appears in contrast [to the U.S.] as a peaceful garden that has remained uncorrupted by the worm of litigation."[22]

The Consciousness school holds that the Japanese are more concerned with the preservation of *wa* (harmony) than standing on their rights. The foundation of consciousness theory is consistent with work in other disciplines (e.g., business) that conclude Japan's culture is unique. Thus despite importing elements of French and German law in the latter 19th and early 20th century, as well as aspects of US law after 1945, there is still some question as to whether these influences had much effect on Japanese legal consciousness. Japanese modern law may be merely a "veneer" behind which the traditional ways of acting and living are perpetuated.[23]

On the other hand, some legal scholars argue that the non-litigious environment in Japan is

a myth.[24] Haley, for example, states that the Japanese have historically been quite litigious, and that any hesitation to litigate is based on a rational cost-benefit analysis, not a particular legal consciousness.[25] Haley's analysis forms part of what is known as the Institutional school.

The Institutional school holds that the uniqueness of the Japanese legal environment is exaggerated. Instead, the Japanese aversion to litigation is due to institutional barriers. Invoking the institutional perspective, Haley concludes that the Japanese are less apprehensive about legal action than previously thought. His theory is that Japan's weak legal influences are reinforced by strong extra-legal community controls. According to Haley there are three fundamental pillars of societal control: (1) administrative-based; (2) adjudicatory-based; and (3) community-based patterns of consensus. Haley suggests that in the absence of these controls, the Japanese are just as likely to seek a legal remedy as those from the allegedly more litigious Western cultures.[26] Examples of administrative-based controls include the official registry systems for family relationships and real property. As a result, a wide variety of issues such as divorce, adoption, succession and real property transfers often dealt with by courts in Western legal systems are beyond the ken of Japanese courts. Adjudicatory-based controls include such things as a lack of a jury system and a frequently transferred career judiciary. The concomitant greater certainty of result means potential litigants can more easily calculate the value of their claim and more readily decide whether to settle, thus avoiding the costs of litigation. Even the Japanese do not avoid litigation when it is financially advantageous.[27] Typically, litigation is avoided because of its high financial costs, long delays, and cumbersome procedures. Further institutional bars include a lack of viable class action and discovery systems and a general shortage of *bengoshi*.[28]

One shortcoming of the Institutional school is its failure to explain why litigants decide to forgo formal legal proceedings when they *do* have something to gain.[29] Also, the Institutional school downplays the importance of the good faith principle in Japanese law.[30] Article 1(2) of the Japanese Civil Code creates an enforceable legal norm that underlies all contracts in Japan.[31] It requires the exercise of rights and the performance of duties to be carried out according to the principles of good faith and trust. This legislation effectively precludes litigation by discouraging questionable behavior a court might later sanction.

The third approach is known as the Relational school. It combines the socio-cultural argument with economic rationality. Milhaupt proposes that Japanese corporate governance is influenced by both socio-cultural influences and efficiency rationales propounded by economists

as well as the institutional factor school of legal culture.[32] The relational school suggests the legal environment in Japan is itself embedded in a larger historical social and political framework that includes both present and past relationships.

The Relational school posits that the Japanese legal environment has adapted to the current state of affairs while maintaining its historical underpinnings. For example, it supports the notion that the Japanese maintain their preference for long-term relationships rather than quick fixes to problems. Parties treat each other like those in a marriage rather than on a one-night stand.[33] The Japanese prefer a less adversarial process and are more willing to forego litigation in order to create a collective benefit, an atmosphere of *wa* and *wakai*. [34]

One common theme in all three schools of thought is their aversion to litigation in the context of a long-term relationship.[35] The literature leaves legal scholars with a macro-environmental (institutional) versus micro-environmental (relational) debate for explaining Japanese legal culture. However, the debate is centered on litigation rates and does not examine other aspects of lawyer-client relations. One important step in understanding these relationships is to determine whether the needs and uses for lawyers in Japan are different among Japanese corporations as compared to Western corporations.

Survey of Foreign and Japanese Companies

Between 1996 and 1998, the writers conducted two mail surveys to determine businesses' needs and views of legal services in Japan. The first survey was in English. It was sent to 2000 foreign companies Japan. Companies were selected randomly from countries' chambers of commerce or business association directories. Surveys that were undeliverable or incomplete reduced the sample size to 1830. A total of 316 (17%) of the first surveys were returned and usable. The second survey was translated into Japanese and back-translated into English to insure accuracy. It was sent to 2000 randomly selected Japanese companies listed in the first and second sections of the Tokyo Stock Exchange. A total of 476 (24%) usable surveys were returned. The overall return rate for both surveys was about 22%.

Corporate Japan's View of the Role of the Foreign Lawyer (FL)

Respondents answered a series of questions pertaining to their attitudes about the needs and usefulness of foreign lawyers in Japan. A five-point scale (1 = "strongly disagree" to 5 = "strongly agree") rated their answers. Table 1, "Descriptive statistics," shows the aggregate responses for the various questions. Overall, the results suggest that foreign lawyers are con-

sidered valuable by both Japanese and foreign businesses.

Table 1.

Descriptive statistics

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree	mean	s.d.	n
Recent law changes have extended FL services*	3 (0.5%)	7 (1.3%)	209 (38.1%)	297 (54.2%)	32 (5.8%)	3.64	0.64	548
Increased scope of FL will help my business	16 (1.9%)	67 (7.9%)	492 (58.1%)	242 (28.6%)	30 (3.5%)	3.24	0.72	847
Limited need for legal services in Japan	53 (6.3%)	275 (32.5%)	364 (43.1%)	132 (15.6%)	21 (2.5%)	2.76	0.88	845
FL hiring bengoshi will help my company	17 (2.0%)	35 (4.1%)	474 (55.9%)	273 (32.3%)	49 (5.8)	3.36	0.74	848
Prefer Japanese lawyers because of local knowledge	5 (0.6%)	59 (7.0%)	261 (31.0%)	446 (52.9%)	72 (8.5%)	3.61	0.76	843
Bicultural legal advice would be better	1 (0.1%)	19 (2.2%)	277 (32.7%)	423 (49.9%)	128 (15.1%)	3.76	0.73	848
Support deregulation of legal services in Japan	3 (0.4%)	7 (0.8%)	171 (20.2%)	478 (56.4%)	189 (22.3%)	3.99	0.70	848

* Note. Numbers reported for this question do not include 283 respondents that indicated they did not know whether the extended services made any difference.

The results indicate an awareness gap exists between Japanese and foreign businesses on changes in the foreign lawyer law. The first question asks whether recent changes in the law have affected the ability of foreign attorneys to provide legal services.[36] The T-test results in Table 2 support this proposition ($t = -5.69$, $p<.001$). As in the first question, a perception gap is apparent pertaining to the advantages of increasing foreign lawyers' scope of activities. Japanese respondents rated this question higher. Also, this difference in attitude is statistically significant ($t=-3.70$, $p<.001$).

Table 2.

T-Test to Compare Mean Rating Scores for Foreign Versus Japanese Firms

		Mean	s.d.	T-value	n
Recent law changes have extended FL services	Foreign	3.40	0.65	-5.69***	164
	Japanese	3.73	0.60		381
Increased scope of FL will help my business	Foreign	3.11	0.88	-3.70***	312
	Japanese	3.32	0.60		529
Limited need for legal services in Japan	Foreign	2.70	1.05	-1.22	311
	Japanese	2.78	0.76		528
Prefer Japanese lawyers because of local knowledge	Foreign	3.62	0.89	0.16	313
	Japanese	3.63	0.28		525
FL hiring bengoshi will help my company	Foreign	3.33	0.87	-0.61	313
	Japanese	3.37	0.65		529
Bicultural legal advice would be better	Foreign	3.92	0.84	4.47***	313
	Japanese	3.68	0.63		529
Deregulation of legal services is a good idea	Foreign	4.21	0.79	6.56***	313
	Japanese	3.87	0.61		530

* $p < .05$; ** $p < .01$; *** $p < .001$
Note. Comparable results were found using the Mann-Whitney U test.

Next, differences in opinion about the legal environment were tested. For the question pertaining to the limited need for legal services in Japan, the overall response was neutral or in slight disagreement. The attitudes of both foreign and Japanese respondents were about the same, no statistically significant difference. More than 60% of respondents indicated that they preferred a Japanese lawyer because of his/her local knowledge. Interestingly, there was no statistical difference in how foreign versus Japanese companies feel about this statement.

Finally, specific regulatory changes were examined. For attitudes about the service benefits of allowing foreign lawyers to hire *bengoshi*, most respondents gave this question a "neutral" rating. Comparing Japanese to foreign companies, no statistical difference was found for the attitude ratings. When asked about the importance of bicultural legal advice, 65 % of the companies responded favorably to this statement. As would be expected, foreign businesses regard bicultural legal advice as being more important than Japanese firms do ($t=4.47$, $p<.001$). Over 78% of respondents responded favorably to a statement that deregulation of legal services is a good idea. This result indicates that most companies support the proposition of legal service deregulation. Comparing Japanese to foreign companies, the latter more strongly support the need for deregulation ($t=6.65$, $p<.001$).

Discussion

The results show interesting differences in respondent awareness and opinions regarding legal services. At the same time, respondent attitudes about the uses for legal services are not significantly different between Japanese and foreign businesses. On the surface, it appears that either the Consciousness or Institutional schools provide reasonable foundations for understanding the relationship between legal service providers and their clients. Closer examination, however, suggests that each school of thought is akin to the story of the blind men describing an elephant. The most compelling explanation seems to come from the Relational school.

Regarding the expanded role of foreign lawyers, Japanese companies responded more favorably. Awareness of regulatory changes in the law provides some evidence that foreign legal services are needed and in demand in Japan. Both foreign and Japanese businesses find the recent regulatory changes improve the range of legal services; however, the latter responded more favorably. This finding is surprising because one of the supposed legislative intents of the law is to allow foreign attorneys to better serve foreign businesses.

Despite changes in the Foreign Lawyer law, Japanese firms still seem to have a greater need for Japanese lawyers. The Consciousness school's interpretation might be that Japanese society is unique and foreign providers cannot provide some specialized services. Foreign attorneys will still be considered "outsiders" regardless of how the law is changed. Given the Japanese preference for conciliation in domestic disputes, it seems probable that Japanese companies primarily use foreign attorneys for overseas activities.

Overall, there seems to be a consensus that Japanese attorneys have important skills that their foreign counterparts lack. More than 60% of all respondents "agree" or "strongly agree" that Japanese lawyers are preferred because of their local knowledge. Comparing Japanese and foreign respondents, there is no statistically significant difference on this issue. All customers need Japanese attorneys because of their mastery of the language, culture, and business environment. This finding is consistent with Milhaupt's conclusions about the Japanese legal environment.[37] For example, a foreign respondent stated, "I regrettably have almost never found that foreigners in the service business provide the quality of service, or the depth of understanding of the business environment to handle the requirements of our company here." A Japanese respondent supported this line of thinking, "Overall, we feel comfortable with Japanese lawyers because of their deep knowledge of Japanese law and the fact that they understand the subtleties of the Japanese [human nature]."

Thus far, the evidence suggests that cultural differences help to explain the findings. While the socio-cultural argument does have its merits, the results do not uniformly support it. Instead, there are some inconsistencies that can be attributed to structural or systemic influences.

First, the results fail to support the proposition that foreign and Japanese businesses have significantly different opinions regarding the need for legal services in Japan. Both foreign and Japanese respondents agree on the omnipresent need for legal services in Japan. The finding does not support the proposition that Japanese are adverse to conflict and therefore keep litigation to a minimum. This line of thinking seems to support the proposition that the informal legal character of Japan is a myth.[38] Essentially, the dispute resolution process seems to be more formalized than is documented in the literature. Also, other evidence supports this proposition. For example, a recent survey of large Japanese companies reports that 95% of them have been involved in legal disputes in the past.[39]

Second, one would expect foreign companies to more strongly support a change in the regulation regarding the employment of *bengoshi* by foreign law firms. One would think that foreign law firms employing Japanese attorneys would be inherently attractive to foreign companies in Japan. While the overall response is slightly positive, there is no difference in opinion between Japanese and foreign firms. On the other hand, firms responded favorably to the availability of bicultural legal advice. In particular, foreign respondents are more inclined to want bicultural services. As this question does not control for the firm's structure, it appears that foreign firms have found other ways to overcome the "cultural" barrier. For example, some legal service providers have entered into joint enterprise schemes to bridge the knowledge gap. These findings suggest that both foreign and Japanese companies are more concerned with the quality of advice and price than they are with the structure and scope of foreign lawyers' practices.

Finally, there is strong support for the deregulation of legal services in Japan. Not surprisingly, foreign businesses are more supportive of deregulation. Even Japanese businesses rated this question highest of all. This finding is consistent not only in the foreign business community, but also among *Keidanren*, Japanese companies and some Japanese politicians. Also, deregulation continues to be the watchword of Japan in the 21st century, with both business and government actively pursuing deregulatory measures.

While the support for deregulation needs to be tempered with the fact that most respondents are from export-oriented or international companies, it does suggest that there may be

some dissatisfaction with the current level of customer service from *bengoshi*.[40] A number of Japanese firms noted that they would prefer to have one-stop shopping for their legal services rather than to visit a number of "specialists" to solve various legal problems. One respondent stated, "We should put an end to the monopolization of the licensed [Japanese lawyer] and start promoting and incorporation. Give out a license to a corporation (sic) practitioner who can provide a *total legal service*."[41] Another respondent commented, "There are two things that we expect from foreign lawyers. One is based on the service of a foreign law. Another is for *organic total service* done with Japanese lawyer."[42] The opportunity for a company to use only one firm to take care of all of its legal service needs appears to be an ideal many companies seek.

One reason for this apparent discontent is that Japanese law firms tend to be too small to effectively handle large cases. The growing number of attorneys in Japan probably will affect this gap between legal service expectations and realities. In fact, the Japanese Federation of Bar Associations agrees that there should be an increase in the number of successful candidates writing the Japanese Bar examination.

A problem with both Consciousness and Institutional arguments is the existence of the foreign lawyer regulations themselves. Why is there any need to have any restrictions on foreign legal service providers in Japan? If Japan's society and legal system are truly unique, Japanese attorneys have nothing to fear from "outsiders." Foreigners will never be able to crack the market because they could not possibly learn the intimacies of Japanese legal culture. In other words, foreign legal services would be self-regulating by customers. Since the reason for retaining legal services is to successfully navigate corporate relationships and legal regulations, why would any rational person choose an inferior legal advisor?

The bottom line is that both foreign and Japanese companies hire attorneys to protect their own self-interests. While elements of the Consciousness and Institutional schools help explain the results, the Relational school addresses the most important issue in the eyes of the customer-the outcome. Is not risk management the most important issue to the client? It seems rational to hire someone that offers the highest degree of protection. The results confirm this notion.

Overall, respondents feel it is more important to have access to native Japanese rather than foreign lawyers. Both cultural and structural rationales help to explain facets of the respondents' attitudes. From the structural perspective, Japanese attorneys can provide a wider array of services. For example, Japanese attorneys are permitted to hire foreign attorneys and conduct litigation; however, foreign firms cannot hire Japanese attorneys or appear before

Japanese courts or administrative bodies. At the same time, language ability plays an important role in the effectiveness of an attorney. The Japanese language is complex and intimately intertwined with its rich history. Native speakers of the language have a clear advantage in navigating the Japanese legal and bureaucratic environment. This advantage suggests that clients stand a better chance of success by choosing a legal service provider that has the appropriate socio-cultural foundation.

Conclusion

From a reciprocal basis, Japan's Foreign Lawyer Law looks quite progressive. For example, requiring only 3 years of experience and allowing practice of 3rd country law indeed equals or exceeds other jurisdictions. Nevertheless, the evidence does not support the contention that these changes have measurably improved the legal services in the eyes of clients. Both foreign and Japanese companies still prefer to use *bengoshi*.

Many industrialized nations allow foreign and local lawyers to associate freely, while in Japan the Specified Joint Enterprise system remains burdensome and unwieldy with many unanswered issues outstanding.[43] An artifact of protecting *bengoshi* from foreign competitors is that it harms both clients and the greater economic interests of Japan.[44] Looking at cities like Paris, Geneva, London, Milan and New York, one can see vigorous financial-legal centers. A common denominator among these examples is that their national governments allow foreign lawyers to associate freely with local lawyers. As Japan's legal system becomes more international, perhaps it will also be added to this list of cosmopolitan cities.[45]

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1) World Trade Organization, *World Exports of Commercial Services by Category*, (2000) < http://www.wto.org/english/res_e/statis_e/its2001_e/section1/i04.xls> (last visited July 1, 2002).

2) *See* IVAN P. HALL, CARTELS OF THE MIND: JAPAN'S INTELLECTUAL CLOSED SHOP 23 (1998) (New York: W.W. Norton & Company).

3) Richard Kanter, *Small-Firm American Lawyers Could Help Small American Companies in Japan, but the Door is Still Shut.* 21 LAW IN JAPAN 49, 54 (1988); U.S. Trade Representative, *National Trade Estimates*

Report on Foreign Trade Barriers 167 (March 1989).

4) Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. 737, 741 (1994).

5) Based on interviews with foreign lawyers in Japan, the estimated cost of opening and operating a law office in Japan is over US $1,000,000 per year.

6) Harri Ramcharran, *Trade Liberalization in Services: An Analysis of the Obstacles and Opportunities for Trade Expansion by U.S. Law Firms*, 7 MULTNAT'L BUS. REV. 26, 29 (1999).

7) Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE, 159, 160 (1996).

8) Koichiro Fujikura, *Administering Justice in A Consensus-Based Society*, 91 MICH. L. REV. 1529, 1539 (1993).

9) U.S. Trade Representative, *"National Trade Estimates Report on Foreign Trade Barriers"* 167 (March 1989).

10) *Gaikoku Bengoshi ni yoru Horitsu Jimu no Toriatsukai ni kansuru Tokubetsu Sochi Ho* 1994.

11) Specifically, the following changes were made.

(a) Reciprocity: Compulsory reciprocity was revised to discretionary reciprocity. The requirement of granting reciprocal rights of practice was eliminated for GATT members.

(b) Professional Experience: The five year home country professional experience requirement was relaxed to permit work experience as a trainee or clerk at a *bengoshi* or *gaikokuho jimu bengoshi's* office within Japan, to be applied to the five-year professional experience requirement. The Japan experience component, however, was limited to a total of two years.

(c) Office Name: Foreign law firms are no longer required to include the name of the *aikokuho jimu bengoshi* heading the office. Under the amendment, the use of the name of the law firm to which a *gaikokuho jimu bengoshi belongs*, the geographical location, or a common noun etc. may be used. However, the name of an office must still include the title *"Gaikokuho Jimu Bengoshi-Jimusho."*

(d) Introduction the of Specific Joint Enterprise Scheme (*Tokutei Kyodo Jigyo*): Before the 1994 amendment, joint enterprises between *gaikokuho jimu bengoshi* and *bengoshi* were prohibited. Due to the request from the U.S. and European countries to allow all types of joint enterprises, this prohibition has been relaxed to permit *gaikokuho jimu bengoshi* and *bengoshi* who possess separate and respective offices to co-handle in the same facilities all matters, other than certain prohibited areas such as litigation cases, and to share revenues and profits derived therefrom. This form of a joint enterprise must be called a "Specific Joint Enterprise".

12) *Gaikoku Bengoshi ni yoru Horitsu Jimu no Toriatsukai ni kansuru Tokubetsu Sochi Ho* 1996.

13) *Gaikoku Bengoshi ni Yoru Horitsu Jimu no Toriatsukai ni kansuru Tokubetsu Sochi Ho* 1998.

14) Specifically, the following changes were made.

(a) Minimum Professional Experience Requirement: The professional experience requirement was reduced from three (3) to five (5) years. One year of work experience as an employed lawyer in Japan

could be included in the three-year requirement.

(b) Scope of Practice - Third Country Law: When a *gaikokuho jimu bengoshi* obtains a written opinion from a qualified lawyer of a third country, the *gaikokuho jimu bengoshi* is permitted to counsel in the law of the third country.

(c) Relaxation of Specific Joint Enterprise: The scope of a Specific Joint Enterprise between *gaikokuho jimu bengoshi* and a *bengoshi* was expanded to cover all international matters, including litigation in Japan.

15) *See* Leonardo Ciano, *Foreign Companies and their Legal Representation in Japan: Isn't the Customer Always Right*?, 13 RITSUMEIKAN L. REV. 17 & nn.1-2.

16) Toshiro Nishimura, *The Relational Contract and Japanese Legal Consciousness*, UNITED STATES/JAPAN COMMERCIAL LAW AND TRADE 696, 698 (Valerie Kusuda-Smick, Ed.) (1990). *See also*: Yoshiuki Noda, *Introduction to Japanese Law* (1976) (Tokyo: University of Tokyo Press).

17) Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 LAW IN JAPAN 1 (Stevens trans., 1974); Eichi Hoshino, *The Contemporary Contract*, LAW IN JAPAN 1 (Haley trans., 1972); *Hoishiki no Kenkyu* (*Research on Legal Consciousness*),35 HOSHAKAIGAKU1 (1983); *Gendai Nihonjin no Ho Ishiki* (*Contemporary Legal Consciousness of Japanese*) (Nihon Bunka Kaigi, Ed.) (1982).

18) Toshio Sawada, *Subsequent Conduct and Supervening Events: A study of two selected problems in contract jurisprudence, dissertation,* (1968) (University of Michigan Law School).

19) Sawada's analysis was based on Macaulay's work done in the US. See, Stewart Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, 9 THE PRACTICAL LAWYER 13 (1963); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

20) Yoshiuki Noda, *Introduction to Japanese Law* (1976) excerpted from, *Nihon-Jin no Seikaku to sono Hoo-Kannen*, in Hideo Tanaka, Ed., *The Japanese Legal System*, (1988) (Tokyo: University of Tokyo Press).

21) Arthur T. Von Mehren, *Some Reflections on Japanese Law*, 71 HARV L. REV. 1486 (1958)

22) Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L.REV. 4, 57 (1983). In this work, Galanter actually questions the existence of a "litigation explosion" in the U.S.

23) RENE DAVID AND J.E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY, 450, (1968) (London: Free Press).

24) *See, e.g., John O. Haley, The Myth of the Reluctant Litigant*, 4 JOURNAL OF JAPANESE STUDIES 349 (1978); John O. Haley, *Legal vs. Social Controls*, 17 LAW IN JAPAN 1 (1984); John. O. Haley, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 83-119 (1991) {hereinafter Haley, *Japanese Paradox*}.

25) Ibid.

26) Haley, *Japanese Paradox*, 116.

27) J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 608 (1985).

28) Hiroshi Oda, *Japanese Law*, 371-372 (1992) (London: Butterworths).

29) Koichiro Fujikura, *Administering Justice in A Consensus-Based Society*, 91 MICH. L. REV. 1529, 1539 (1993).

30) The duty of good faith and fair dealing comes from Article 1(2) of the Civil Code: "The exercise of rights and the performance of duties shall be carried out in accordance with the principles of good faith and trust."

31) *See, e.g.*, Kazuto Yukizawa, *Shotorihiki ni Okeru Seijitsu Gimu no Kino* [*The Function of the Duty of Good Faith in Commercial Transactions*], 55 SHIHO 263 (1993).

32) Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 HARV. INT'L. L.J. 3, 8 (1996).

33) Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569 (1985).

34) SEE V. LEE HAMILTON and JOSEPH SANDERS, EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES, (1992) (New Haven, CT: Yale University Press).

35) Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

36) Survey respondents had the option of selecting "do not know" as an answer. A binary variable was created to compare respondents having an opinion about changes in the regulations with those that do not. For respondents with an opinion about recent changes in the foreign lawyer law, 60% (329) feel the changes have resulted in a better range of services. Of particular interest is that only two-thirds of respondents (n=548) have any opinion about the recent law changes. A chi-square test was used to compare awareness between Japanese and foreign companies. Statistically significant differences were found ($X2 = 32.12$, $p<.001$). This finding suggests that there may be an awareness gap between foreign and Japanese companies on legal service regulations. Comparing the expected to the actual values for this test, Japanese companies are more likely to have an opinion regarding recent changes in the foreign lawyer regulations.

37) Milhaupt, *A Relational Theory of Japanese Corporate Governance* (1996).

38) *See, e.g.*, John O. *Haley, The Myth of the Reluctant Litigant*, 4 JOURNAL OF JAPANESE STUDIES 349 (1978); John O. Haley, *Legal vs. Social Controls*, 17 LAW IN JAPAN 1 (1984); J. O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX (1991).

39) "Corporations take shine to legal action," Nikkei Weekly, October 25, 4 (1999).

40) "Japanese Companies Judge Their Lawyers Ill-prepared for Era of Deregulation," *Nikkei Weekly*, October 27, 1997. Twenty-five percent (25%) of top Japanese manufacturers polled were dissatisfied with the services provided by their Japanese lawyers.

41) Translated from the original Japanese (emphasis added).

42) Translated from the original Japanese (emphasis added).

43) In a report published on June 12, 2001, the Justice System Reform Council recommended requirements for specified joint enterprises should be relaxed "to promote cooperation and coordination between Japanese lawyers and gaikoku jimu bengoshi." *Recommendations of the Justice System Reform Council-For a Justice System to Support Japan in the 21st Century*, The Justice System Reform Council, June 12, 2001. < http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> (last visited July 1, 2002).

44) *See* Drew Martin and Leonardo Ciano, *Social-Cultural and Structural Influences on the Use of Japanese Lawyers*, INT'L J. COM. & MGMT L. REV. (forthcoming) for a discussion of clients' difficulties in obtaining legal services in Japan.

45) *See* Drew Martin and Leonardo Ciano, *Retaining Foreign Legal Services in Japan's Regulated Market*, 22-4 SERVICES MKTG. Q. J. COM. & MGMT L. REV. 43 (2001) for further discussion on the negative competitive effect of Japan's foreign lawyer law.